Comparison of common law and equity law essay sample

Law, Court

Originally, common law was customary law, folk law, based on precedent. There was of course statutory law — the king’s law — but common law guided how it was enforced and administered. No real common law exists today, having been entirely codified as statutory law throughout the English-speaking world. There remains, however, what are sometimes termed common law rights.

Now and again, a new situation arises where there is no law to guide a judge, but where there really is something to adjudicate. One case I recall (from the 70?) involved a common law right to sunshine for solar panels; a homeowner had installed such panels, but a neighbor subsequently built a fence or structure which blocked the sun’s rays. The guy was adjudged to have a common law right to the sunshine, more or less on old common law water-rights law and the neighbor lost. This particular case involved equity as well.

Equity came into play when there was no precedent for the case at hand. This happens even today. If there is something for the court to adjudicate, but no guiding precedent or statute to guide how the case is to be decided, the judge (perhaps through a jury) creates a new precedent based on what is fair and equitable. This is a very common sense legal doctrine.

A system of jurisprudence supplementing and serving to modify the rigor of common law.

History of the common law

Common law originally developed under the inquisitorial system in England from judicial decisions that were based in tradition, custom, and precedent.

Such forms of legal institutions and culture bear resemblance to those which existed historically in continental Europe and other societies where precedent and custom have at times played a substantial role in the legal process, including Germanic law recorded in Roman historical chronicles. The form of reasoning used in common law is known as casuistry or case-based reasoning. The common law, as applied in civil cases (as distinct from criminal cases), was devised as a means of compensating someone for wrongful acts known as torts, including both intentional torts and torts caused by negligence, and as developing the body of law recognizing and regulating contracts. The type of procedure practised in common law courts is known as the adversarial system; this is also a development of the common law.

Before the institutional stability imposed on England by William the Conqueror in 1066, English residents, like those of many other societies, particularly the Germanic cultures of continental Europe, were governed by unwritten local customs that varied from community to community and were enforced in often arbitrary fashion. For example, courts generally consisted of informal public assemblies that weighed conflicting claims in a case and, if unable to reach a decision, might require an accused to test guilt or innocence by carrying a red-hot iron or snatching a stone from a cauldron of boiling water or some other “ test” of veracity (trial by ordeal). If the defendant’s wound healed within a prescribed period, he was set free as innocent; if not, execution usually followed.

In 1154, Henry II became the first Plantagenet king. Among many achievements, Henry institutionalized common law by creating a unified system of law “ common” to the country through incorporating and elevating local custom to the national, ending local control and peculiarities, eliminating arbitrary remedies, and reinstating a jury system of citizens sworn on oath to investigate reliable criminal accusations and civil claims. The jury reached its verdict through evaluating common local knowledge, not necessarily through the presentation of evidence, a distinguishing factor from today’s civil and criminal court systems.

Henry II’s creation of a powerful and unified court system, which curbed somewhat the power of canonical (church) courts, brought him (and England) into conflict with the church, most famously, with Thomas Becket, the Archbishop of Canterbury. Things were resolved eventually, at least for a time, in Henry’s favour when a group of his henchmen murdered Becket. For its part, the Church soon canonized Becket as a saint.

Thus, in English legal history, judicially-developed “ common law” became the uniform authority throughout the realm several centuries before Parliament acquired the power to make laws.

As early as the 15th century, it became the practice that litigants who felt they had been cheated by the common-law system would petition the King in person. For example, they might argue that an award of damages (at common law) was not sufficient redress for a trespasser occupying their land, and instead request that the trespasser be evicted. From this

developed the system of equity, administered by the Lord Chancellor, in the courts of chancery. By their nature, equity and law were frequently in conflict and litigation would frequently continue for years as one court countermanded the other, even though it was established by the 17th century that equity should prevail. A famous example is the fictional case of Jarndyce and Jarndyce in Bleak House, by Charles Dickens.

In England, courts of law and equity were combined by the Judicature Acts of 1873 and 1875, with equity being supreme in case of conflict.

In the United States, parallel systems of law (providing money damages) and equity (fashioning a remedy to fit the situation, including injunctive relief) survived well into the 20th century in many jurisdictions. The United States federal courts procedurally separated law and equity until they were combined by the Federal Rules of Civil Procedure in 1938 – the same judges could hear either kind of case, but a given case could only pursue causes in law or in equity, under two separate sets of procedural rules. This became problematic when a given case required both money damages and injunctive relief.

Delaware still has separate courts of law and equity, and in many states there are separate divisions for law and equity within one court

Common law

The common law forms a major part of the law of those countries of the world with a history as British territories or colonies. It is notable for

its inclusion of extensive non-statutory law reflecting precedent derived from centuries of judgments by working jurists.

There are three important connotations to the term.

Common law as opposed to statutory law and regulatory law: The first connotation differentiates the authority that promulgated a particular proposition of law. For example, in most areas of law in most jurisdictions in the United States, there are “ statutes” enacted by a legislature, “ regulations” promulgated by executive branch agencies pursuant to a delegation of rule-making authority from a legislature, and “ common law” decisions issued by courts (or quasi-judicial tribunals within agencies). This first connotation can be further differentiated, into (a) laws that arise purely from the common law without express statutory authority, for example, most of the criminal law, contract law, and procedural law before the 20th century, and (b) decisions that discuss and decide the fine boundaries and distinctions in statutes and regulations. See statutory law and non-statutory law.

Common law as opposed to civil law: The second connotation differentiates “ common law” jurisdictions (most of which descend from the English legal system) that place great weight on such common law decisions, from “ civil law” or “ code” jurisdictions (many of which descend from the Napoleonic code in which the weight accorded judicial precedent is much less).

Law as opposed to equity: The third differentiates “ common law” (or just “ law”) from “ equity”. Before 1873, England had two parallel court systems,

courts of “ law” that could only award money damages and recognised only the legal owner of property, and courts of “ equity” that recognised trusts of property and could issue injunctions (orders to do or stop doing something). Although the separate courts were merged long ago in most jurisdictions, or at least all courts were permitted to apply both law and equity (though under potentially different laws of procedure), the distinction between law and equity remains important in (a) categorising and prioritising rights to property, (b) determining whether the Seventh Amendment’s guarantee of a jury trial applies (a determination of a fact necessary to resolution of a “ law” claim) or whether the issue can only be decided by a judge (issues of equity), and (c) in the principles that apply to the grant of equitable remedies by the courts.

Many important areas of law are governed primarily by common law. For example, in England and Wales and in most states of the United States, the basic law of contracts and torts does not exist in statute, but only in common law. In almost all areas of the law, statutes may give only terse statements of general principle, but the fine boundaries and definitions exist only in the common law. To find out what the law is, one has to locate precedential decisions on the topic, and reason from those decisions by analogy.

Equity is the name given to the set of legal principles, in countries following the English common law tradition (see English law), which supplement strict rules of law where their application would operate harshly, so as to achieve what is sometimes referred to as “ natural justice.” It is often confusingly contrasted with “ law,” which in this context refers to “ statutory law” (the

laws enacted by Parliament), and “ case law” (the principles established by judges when they decide cases).

Distinction between law and equity

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In modern practice, perhaps the most important distinction between law and equity is the set of remedies each offers. The most common remedy a court of law can award is money damages. Equity, however, enters injunctions or decrees directing someone either to act or to forbear from acting. Often this form of relief is in practical terms more valuable to a litigant. A plaintiff whose neighbor will not return his only milk cow, which wandered onto the neighbor’s property, for example, may want that particular cow back and not just its monetary value. Law courts also enter orders, called “ writs” (such as a writ of habeas corpus) but they are less flexible and less easily obtained than an injunction.

Another distinction is the unavailability of a jury in equity. Equitable remedies can be dispensed only by a judge as it is a matter of law and not subject to the intervention of the jury as trier of fact. The distinction between “ legal” and “ equitable” relief is an important aspect of common law systems, including the American legal system. The right of jury trial in civil cases is guaranteed by the Seventh Amendment of the Constitution but only in cases that traditionally would have been handled by the law courts at

Common Law. The question of whether a case should be determined by a jury depends largely on the type of relief the plaintiff requests. If a plaintiff requests damages in the form of money or certain other forms of relief, such as the return of a specific item of property, the remedy is considered legal, and the American Constitution guarantees a right to a trial by jury. On the other hand, if the plaintiff requests an injunction, declaratory judgment, specific performance or modification of contract, or other non-monetary relief, the claim would usually be one in equity.

A final important distinction between law and equity is the source of the rules governing the decisions. In law, decisions are made by reference to legal doctrines or statutes. In contrast, equity, with its emphasis on fairness and flexibility, has only general guides known as the maxims of equity. As noted above, a historic criticism of equity as it developed was that it had no fixed rules of its own with the Lord Chancellor from time to time judging in the main according to his own conscience. As time went on the rules of equity did lose their flexibility and from the 17th Century onwards equity was rapidly consolidated into a system of precedents much like its cousin Common Law.

Charles Dickens’ Bleak House parodied the excessive time and expense associated with the Court of Equity in 19th century England.

History

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The distinction between “ law” and “ equity” is an accident of history. The “ law courts” or “ courts of law” were the courts all over England that enforced the king’s laws in medieval times. At the end of the 13th century the courts of law gradually froze the types of claims they would hear, and the procedure that governed the hearing of those claims. Because the range of legal claims at that time was quite narrow, legal procedures were painfully hypertechnical, and jurors were often bribed, the result was that many meritorious plaintiffs were denied relief.

However, remedies could also be obtained through filing a petition with the king, who held residual judicial power; these filings were usually phrased in terms of throwing oneself upon the king’s mercy or conscience. Eventually, the king began to regularly delegate the function of resolving such petitions to the Chancellor, an important member of the King’s Council. At the time, the Chancellor was usually a clergyman and the King’s confessor, so he was literally the keeper of the King’s conscience. Soon the Chancery, the Crown’s secretarial department, began to resemble a judicial body and became known as the “ Court of Chancery”.

By the 15th century, the judicial power of the Chancery was recognised. Equity, as a body of rules, varied from Chancellor to Chancellor, until the end of the 16th century. After the end of the 17th century, only lawyers were appointed to the office of Chancellor.

One area in which the Court of Chancery assumed a vital role was the enforcement of uses, a role which the rigid framework of land law could not accommodate. This role gave rise to the basic distinction between legal and equitable interests.

Development of Equity in England

It was early provided that, in seeking to remove one who wrongfully entered your land with force and arms, you could allege disseisen (dispossession) and demand (and pay for) a writ of entry. That writ did not just give you the written right to re-enter your own land, it gave it you under the protection of the Crown if need be, whence its value. In 1253, to prevent judges from inventing new writs, Parliament provided that the power to issue writs would thereafter be transferred to judges only one writ at a time, in a “ writ for right” package known as a form of action. However, because it was limited to enumerated writs for enumerated rights and wrongs, the writ system sometimes produced unjust results. Thus, even though the King’s Bench might have jurisdiction over your case and might have the power to issue the perfect writ, you might still not have a case if there was not a single form of action combining them. Therefore, lacking a legal remedy, your only option would be petitioning the King.

People started petitioning the King for relief against unfair judgments and as the number of petitioners rapidly grew, the King delegated the task of hearing petitions to the Lord Chancellor. The first Chancellors were men of the cloth, and they were required to pass judgment guided by conscience

and based on morals and equality. It has been suggested that ecclesiastics were chosen for this position as they belonged to the small class of people who were able to read and write.

As these Chancellors had no formal legal training, and were not guided by precedent, their decisions were often widely diverse. However, in 1529 a lawyer, Sir Thomas More, was appointed as Chancellor, marking the beginning of a new era. After this time, all future Chancellors were lawyers, and from around 1557 onwards, records of proceedings in the Courts of Chancery were kept, leading to the development of a number of equitable doctrines. Criticisms continued. The 17th century Jurist John Selden once said that “ equity varies with the length of the Chancellor’s foot”.

As the law of equity developed, it began to rival and conflict with the common law. Litigants would go ‘ jurisdiction shopping’ and often would seek an equitable injunction prohibiting the enforcement of a common law court order. The penalty for disobeying an equitable ‘ common injunction’ and enforcing a common law judgment was imprisonment.

The Chief Justice of the King’s Bench, Sir Edward Coke began the practice of issuing writs of habeas corpus, which required the release of people imprisoned for contempt of chancery orders.

This tension grew to an all-time high in the Earl of Oxford’s case (1615), where a judgment of Coke CJ was allegedly obtained by fraud. The Court of Chancery issued a common injunction prohibiting the enforcement of the common law order. The two courts became locked in a stalemate, and the

matter was eventually referred to the Attorney-General, Sir Francis Bacon. Sir Francis, by authority of King James I, upheld the use of the common injunction and concluded that in the event of any conflict between the common law and the law of equity, equity would prevail. Equity’s primacy in England was later enshrined in the Judicature Acts of the 1870s, which also served to fuse the courts of equity and the common law into one unified court system.

SOURCES:

Andrew Edgecomb 2006; Equity in a Nutshell by T. Cockburn & M. Shirley, Lawbook Co, Sydney, 2005; Equity & Trusts by T. Cockburn, W. Harris & M. Shirley, Butterworths, Sydney, 2005.

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